55-1700-10487-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF RIGHTS

State of Minnesota, by David Beaulieu,
Commissioner, Department of Human Rights,

Complainant,

v.

Beaute' Techniques, Inc. and Gene
Cassidy, individually

Respondents.

ORDER ON MOTION FOR
SUMMARY JUDGMENT

The above-entitled matter is before the undersigned Administrative Law Judge on Respondents' motion for summary judgment.

Stewart R. Perry, Shawn M. Perry, and Shane C. Perry, Perry, Perry & Perry, 402 Towle Bldg., 330 Second Avenue South, Minneapolis, Minnesota 55401 are representing the Respondents. Carl M. Warren, Esq., and Karen Charlson and Jan Haywood, Certified Student Attorneys, University of Minnesota Law Clinics, 190 Law Center, 229 - 19th Avenue South, Minneapolis, Minnesota 55455, are representing the Complainant. Written submission were received from both parties. Respondents, at their request, filed a supplemental brief, to which Complainant filed a reply on September 10, 1996.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the following memorandum, the Administrative Law Judge makes the following:

ORDER

The Respondents' motion for summary judgment is DENIED in part and GRANTED in part, as set forth below:

1. The motion is denied as to Count I of the Complaint.

2. The motion is granted as to Counts II and III of the Complaint, which are hereby DISMISSED as to both Respondents.

Dated: September 29, 1996

Sara D. Jay
Administrative Law Judge

MEMORANDUM

Background

This action arises from charges filed with the Minnesota Department of Human Rights ("Department") against Respondents Beaute' Techniques, Inc. ("Company") and Gene Cassidy ("Cassidy"), its owner prior to sale, on behalf of Paula Nistler ("Nistler"), a former employee of the company.

Nistler worked for the Company in its St. Cloud location from October 15, 1990 until April 1991 when she was promoted to the position of administrative assistant. The promotion required her to move to St. Paul, where Company headquarters were located. In early April 1991, Nistler moved to St. Paul and began working for Cassidy. The following facts are recited from the view most favorable to the non-moving party, for purposes of this motion.

Cassidy habitually greeted Nistler and other female employees with a hug and kiss on the cheek. Cassidy kissed and hugged Nistler on other occasions as well, and patted Nistler on the buttocks as he passed by. Cassidy's conversation included sexual innuendo and sexual references, frequent use of the word "fuck," and demeaning references to women. Nistler did not verbally communicate her displeasure at Cassidy's daily unwanted touching; however, she attempted to avoid Cassidy's touching by pulling away from him.

The following facts are not in dispute. In August 1991, Nistler resigned from her employment. Nistler contacted the Department shortly after her resignation. On May 7, 1992, the Department docketed Nistler's verified charge of sex discrimination based on sexual harassment and unequal pay, Docket E24131, against "Beaute' Technique, Inc." as respondent. Also on May 7, 1992, the Department notified "Owner, Beaute' Technique" that a charge had been filed against Beaute' Technique.

On July 7, 1992, Nistler filed a second verified charge, Docket ER19920034 ("Charge II"). On that form, "aiding and abetting and obstruction" was checked. The Respondent named in the Charge II was "Gene Cassidy c/o Beaute' Techniques." The first and second charges are based on the same facts and contain the same language, with the exception that the second charge omits references to Nistler's leaving her employment and to her pay. The second charge consistently refers to Cassidy as the "Respondent."

Charge II was docketed on July 15, 1992, and a letter was sent, addressed to "Owner, Beaute' Technique Inc." notifying the owner of a charge captioned "Paula Nistler v. Beaute' Technique Inc."

On or about November 20, 1992, the assets of Beaute' Techniques were sold. Cassidy's affidavit entered herein implies that Beaute' Techniques did not retain assets sufficient to indemnify him for matters relating to the Nistler charges.

On December 10, 1993, the Department sent correspondence to "Owner, Beaute' Technique Inc.," in two separate letters, providing notice of the findings on each charge. Both charges continued to be captioned, "Paula Nistler v. Beaute' Technique Inc." The letters regarding the charges are identical, except for the charge number. Both letters explain that probable cause has been found to credit part of the charge, and no probable cause has been found to credit part of the charge. Both letters state, under the heading, "Determination of No Probable Cause," that a memorandum explaining the basis for the determination is enclosed. Both letters contain an enclosure entitled "Findings."

The "Findings" for both charges are identical, with the exception of the charge number, and with the exception that several references made to "Respondent's owner" in the first charge have been changed to "Respondent" in the Findings relating to Charge II. Both sets of Findings recite that there is probable cause to believe "Respondent discriminated against Charging Party by subjecting her to conduct which constituted sexual harassment in violation of Minnesota Statutes Chapter 363.03 subd. 1(2)(c)." Both sets of Findings recite the definition of sexual harassment contained in the Minnesota Human Rights Act; neither set of findings refers to Nistler's pay discrimination claim, nor to the law or facts relating to aiding and abetting.

Separate findings are made regarding the pay discrimination claim and allegations of constructive discharge. Those findings, labelled with the Docket Number for Charge II, conclude that sex was not a factor in setting Nistler's pay, and that she was not constructively discharged. The Order included with those findings orders that Charge II be dismissed.

By letter dated August 11, 1994, the Department informed Respondents that the cases had been referred for conciliation, and simultaneously informed them that the assigned investigator anticipated delays in proceeding due to his caseload. Conciliation efforts began in November 1994. Upon failure of conciliation efforts, the cases were referred for litigation in February 1995.

The Complaint in this case was served on April 9, 1996, and contains three counts. The first count is against the Company, on the basis of sexual harassment; the second count alleges that both Respondents committed acts of reprisal against Nistler; the third count alleges that Cassidy aided and abetted discrimination.

Motion for Summary Judgment

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary

judgment is the administrative equivalent to summary judgment, and the same standards apply. Minn. R. 1400.5500(K).

To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The non-moving party is entitled to the most favorable view of the evidence. Foley v. Allard, 427 N.W.2d 6 69 (Minn. 1988).

Respondents have moved for summary judgment on the basis that all of the claims against them are time-barred, primarily on the basis of the decisions of the Minnesota Supreme Court and Court of Appeals in State by Beaulieu v. RSJ, Inc., _ N.W.2d _, 1996 WL 490725 (Minn., August 29, 1996), affirming as modified 532 N.W.2d 610 (Minn. App. 1995).

In RSJ, six employees filed sex discrimination charges against the employer based on a change in uniforms for female waitresses. The new uniforms, which were required, were revealing, consisting of high-cut shorts and loose tank tops. Several of the charging parties were discharged upon their refusal to wear the uniform, and the remaining charging parties were discharged or quit due to their disagreement with the uniform change. OAH Docket 69-1700-8425-2.

The uniform change became effective on April 28, 1989. Charges were filed against the company between July 10, 1989 and April 27, 1990. The Department determined that there was probable cause to credit the charges of sex discrimination against the company on June 22, 1992 as to the first charge filed, and on November 30, 1990 as to the remaining charges. The Department filed its complaint on behalf of the charging parties on November 30, 1993, naming as respondents both the company and the majority shareholder, Mr. Schaefer, individually. In the interim, in May 1993, the company had sold its assets.

RSJ went to hearing before an administrative law judge, who had earlier denied a motion for summary judgment in which RSJ took the position that the claim against Schaefer was untimely, and that a principal shareholder could not be liable for aiding and abetting. The administrative law judge found that RSJ and Schaefer had discriminated against the charging parties, and made a substantial award.

The major shareholder in RSJ had decided upon and implemented the uniform change. His name was mentioned in the charges, and he had fully participated in conciliation efforts. However, no charge of aiding and abetting, or of any kind, had been filed against him. None of the charging parties had filed claims against him, nor had the Department filed a commissioner's charge. Further, no finding of probable cause had been made against him. As is apparent from the facts, the probable cause finding against the company was not issued until 31-35 months after the filing of the charges.

The case came before the Minnesota Court of Appeals on writ of certiorari, with argument based in part on the lapse of time between the filing of the charges and the determination of probable cause, significantly longer than the twelve month period allotted by Minn. Stat. 363.06, subd. 4(1). The Court of Appeals agreed that "the complaint must be dismissed because of the almost three year delay in this case," 532 N.W.2d at 613, and that the claim of aiding and abetting against the individual . The Court of Appeals further held that the claim of aiding and abetting

against Schaefer was untimely, as the claim had never been the subject of a charge, and that Schaefer could not be held liable as an individual as an "exception to the limitation of corporate liability." Id. The Court of Appeals found that Schaefer could not be held liable under the "responsible corporate officer" doctrine, which imposes liability on individual corporate officer only if, inter alia, "the law violated is a public welfare statute that imposes strict liability," citing In re Dougherty, 482 N.W.2d 485, 486 (Minn. App. 1992), pet. for rev. denied, (Minn. June 10, 1992). The Court of Appeals pointed out that the MHRA does not impose strict liability for harassment.

The case was appealed, the appeal being decided after the filing of the complaint herein. In its decision, the Minnesota Supreme Court stated:

> When, as in this case, no charge has been filed by either a charging party or the Commissioner against the respondent alleging a discriminatory practice on the part of the respondent and the charges which were filed were not amended to include the respondent and no basis exists for tolling the limitations period, the claim is barred as untimely.
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> 1996 WL 490725 at *5.

Next, the Court considered whether the language of Minn. Stat. 353.06, subd. 4(1), requiring the Commissioner to make a probable cause determination within twelve months of the filing of the charge, is mandatory or directory. The Court concluded that the language is clearly mandatory, and dismissed the claims against both the company and the majority shareholder, stating:

> We, therefore, hold that in all cases where the MDHR fails to make a determination of probable cause within 12 months after the filing of a charge, a respondent may seek appropriate relief from the administrative law judge. The relief granted by the administrative law judge should be in proportion to the prejudice suffered by the respondent and may include dismissal of the complaint. Normally, we leave the determination of prejudice and the relief to be granted to the administrative law judge; however, we conclude, as a matter of law, that probable cause determination made 31 or more months after a charge is filed are per se prejudicial to the respondent and require dismissal of the complaint. [Footnote omitted.]
>
> Today's ruling that probable cause determinations made 31 months or more after a charge is filed are per se prejudicial to the respondent, requiring dismissal of the complaint, shall be applied to the parties before the court in this case and prospectively to all human rights charges filed with the MDHR on or after the date of this opinion. [citation omitted].
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> 1996 WL 490725 at *7.

The Court specifically declined to consider the Court of Appeals' holdings regarding liability of a corporate officer for aiding and abetting and under the responsible corporate officer doctrine. Id. at fn. 4, *10.

The case herein bears some striking similarities to the facts in RSJ; however, there are also some important differences, particularly as to Count I of the Complaint. Each Count is therefore discussed individually.

Count I

Count I of the Complaint herein alleges that the Company discriminated against Nistler on the basis of sex, due to sexual harassment. Count I is based on Nistler's first charge, which was timely filed and verified, and fully and consistently identified the Company as the respondent.

The probable cause finding on Nistler's original charge was issued nineteen months after filing. While this period is not within the statutory time frame, it is not so late as to be inherently prejudicial.[1] The Respondent Company did sell its assets before issuance of the probable cause determination. However, the asset sale took place within six months after the filing of the first charge. From this timing, it is evident that Respondents were not relying on the lack of a probable cause determination in making provisions for future or unknown liabilities of the corporation or its officers.

It is true that MDHR took nearly a year following the probable cause determination before conciliation efforts commenced, which efforts lasted for only a few months. More than two years passed between the issuance of the probable cause finding and issuance of the complaint.

There is little doubt from the structure of the Act that the legislature intended the administrative process in discrimination actions to move forward promptly. However, there is no statutory limit on the period between finding of probable cause and the issuance of a complaint by the commissioner.

The Company had been fully notified of the scope of the sexual harassment charge, and had reasonable opportunity to retain counsel and maintain evidence relating to this charge, which is the subject of Count I. Under the circumstances present here, the delays do not provide sufficient reason to dismiss the allegations of sexual harassment against the Company.

Count II

Count II of the Complaint alleges that both the Company and Cassidy engaged in conduct constituting reprisals against Nistler for having complained to a supervisory employee about Cassidy's conduct. Reprisals constitute a violation of Minn. Stat. 363.03, subd. 7.

Reprisal includes any form of retaliation. A claim of reprisal can result in liability even where no liability for discrimination is found. Facts relating to initial acts of discrimination are necessarily different from facts which would support a claim of reprisal for objecting to the initial acts of discrimination. Thus, a claim of discrimination does not contain an implicit claim of reprisal discrimination.

Here, neither charge contains a reference to reprisal. Neither charge was ever amended to include a charge of reprisal, as permitted prior to issuance of a complaint. Minn. R. 5000.0500, Subp. 5. Correspondence and Findings from the Department did not refer to reprisal in any manner, not by statute number nor by name, not in text nor by indication on the form check boxes. No correspondence or findings from the Department discuss reprisal liability. The facts alleged in the Complaint which would support a claim of reprisal were not mentioned in either of the charges or any of the Findings. Thus, the Complaint is the first notice to either the Company or to Cassidy that they might have liability for reprisal. That notice came nearly five years after the alleged acts of reprisal occurred. Clearly, this claim is barred by the requirement of Minn. Stat. 363.06, Subd. 1, that claims under the MHRA be filed within one year following the violation.

Count III

Count III of the Complaint alleges that Cassidy aided and abetted the Company in sexually harassing Nistler. This claim is based on the second charge filed by Nistler, in July 1992, which names Cassidy as the Respondent.

Under Title VII of the Civil Rights Act, Cassidy could be directly charged with his acts of discrimination, as an "agent" of the employer under Section 701. However, the MHRA does not include agents within the definition of "employer," unlike Title VII.

The Department, prior to RSJ, has customarily held individual employees of a corporation accountable for their acts of discrimination as aiders and abettors of the corporation's discrimination. See, e.g., State by Khalifa v. Skwarek, OAH Docket 8-1700-1741-2 (Order Granting Motion for Summary Judgment on a Claim of Reprisal and Denying Motions for Summary Judgment on Other Grounds, March 31, 1988)(reasoning that the corporate "person" is aided and abetted in violating the MHRA by the discriminatory acts of the store manager); see also State v. T.L.M. Enterprises, Inc., OAH Docket 8-1700-2837-4 (Order Denying Motion to Dismiss and Motions for Summary Disposition, June 6, 1989)(discussing at length basis for equating MHRA aiding and abetting charge with Title VII charge naming an agent).

This interpretation of the MHRA has been rejected by the Minnesota Court of Appeals in RSJ, and the Minnesota Supreme Court has declined to review the holding that a corporate officer cannot be liable for aiding and abetting. It is rare that an interpretation of existing law is denominated "new law" and applied only prospectively, Turner v. IDS Financial Services, 471 N.W.2d 105, 108 (Minn. 1991). Further, the interpretation of the aiding and abetting provision as providing for individual liability has not been unequivocally endorsed by the Minnesota Supreme Court. But see State by McClure v. Sports and Health Club, 370 N.W.2d 844 (Minn. 1985)(finding that piercing of corporate veil made shareholders individually liable, and made aiding and abetting provision inapplicable). Thus, it is debatable whether denying individual officer liability under the 'aiding and abetting' provision is actually "new law." Therefore, the Court of Appeals decision disallowing such liability applies to this case, and Cassidy cannot be found liable for aiding and abetting the Company's discrimination.

In addition to the Court of Appeals' holding, there are further factors here which mitigate against finding Cassidy could have individually liability. Unlike the corporate officer in RSJ, Cassidy was clearly charged individually; however, the Department's treatment of that charge creates confusion. The cover letter with the charge is not addressed to Cassidy, but only to "Owner." More important, the probable cause finding on Charge II addresses only sexual harassment, and not aiding and abetting. To add to the confusion, the probable cause finding names as the respondent "Beaute' Technique Inc.," not Cassidy. While it is obvious that Cassidy's conduct was the basis of the charge, the possibility of individual liability was not made clear in the probable cause finding. In literal terms, there never was a finding of probable cause to believe that Cassidy aided and abetted the Company in sexually harassing Nistler.

There is no provision of the MHRA which requires that a commissioner's complaint be no broader than the probable cause finding. Minn. R. 5000.0900, subp.1, allows the commissioner to issue a complaint following a determination of probable cause, "or when the commissioner has reason to believe that a person is engaging in an unfair discriminatory practice." Id. However, here, it could have appeared to Cassidy that the Department had abandoned the allegation of individual liability for aiding and abetting, when the only clear references to that liability are in the July 1992 charge and the April 1996 complaint.

Therefore, under all the circumstances, Count III of the Complaint should be dismissed.

S.D.J.

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[1] See RSJ, 1996 WL at *7, "We find nothing in the HRA which suggests that the MDHR's failure to make a timely probable cause determination is a jurisdictional bar to further proceedings. At most, the delay and any resulting prejudice raise equitable defenses to be resolved by the ALJ. EEOC v. Johnson Co., 421 F. Supp. 652, 656 (D. Minn. 1975). In resolving these issues, the ALJ should be mindful that the relief, if any, granted to the respondent because of the MDHR's inaction may have an impact on the charging party. Any such impact should be minimized."